No. 249

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

WYATT TEE WALKER, MARTIN LUTHER KING, JR., RALPH ABERNATHY, A. D. KING, J. W. HAYES, T. L. FISHER, F. L. SHUTTLESWORTH AND J. T. PORTER, *Petitioners*.

v.

CITY OF BIRMINGHAM, A MUNICIPAL CORPORATION OF THE STATE OF ALABAMA

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief as *amicus curiae* in support of petitioners' petition for a rehearing. The consent of the attorneys for the petitioners has been obtained. The consent of the attorneys for the respondent was requested but refused.

The AFL-CIO has never before asked leave of this Court to file an *amicus* brief urging grant of a petition for rehearing. We do so now because we are concerned that the decision of the Court in this case may furnish local officials and judges with a means of destroying rights of free speech and assembly generally, and the right of workers to organize in particular. Further, it has been the experience of the AFL-CIO over many years that in some areas local officials, including, unfortunately, judges, will seize upon any legal device available to frustrate union organization.

Counsel for the petitioners have dealt and will deal with the general impact of the decision on free speech and assembly. The memorandum for the United States as Amicus Curiae likewise covered, admirably we think, that aspect of the case. While the AFL-CIO is, naturally, deeply concerned with those issues, we shall, to avoid duplication, treat principally the area of our particular concern and experience.

Hence we ask leave to place before the Court a statement of our reasons for believing, on the basis of the experience of AFL-CIO unions, that its decision in this case may be widely used to destroy the right of workers to organize; that it may facilitate the undercutting by hostile local officials both of basic constitutional rights and of national labor policies embodied in federal legislation; and that the decision should, therefore, be reconsidered. A brief containing such a presentation is tendered with this motion.

Respectfully submitted,

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

INTEREST OF THE AFL-CIO

This brief *amicus curiae* is tendered for filing by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's granting the Motion for Leave to File a Brief Amicus Curiae.

The AFL-CIO is primarily an association of one hundred twenty-nine national and international unions. These unions are active in organizing and representing employees in collective bargaining throughout the United States, including the southeastern part of the United States. The AFL-CIO itself is likewise active in organizing throughout the United States, and for that purpose maintains a Department of Organization comprised of a director, two assistant directors, 20 regional directors, 10 assistant regional directors, and a staff of 124 field representatives. The AFL-CIO and its affiliated unions thus have had extensive experience with the obstacles, legal and otherwise, to organizing in the southeastern part of the United States.

Those obstacles are substantial. A compilation appearing in *Business Week* for April 25, 1964, p. 49, shows that whereas the percentage of eligible workers in unions is 31% for the country as a whole, the figure for North Carolina is 7.4%, for South Carolina 7.8%, for Virginia 11.6%, for Florida 12.7%, for Georgia 13.4%, and for Mississippi 13.7%. Only Alabama among the southeastern states shows a figure approaching that for the Nation as a whole, i.e.: 30.2%, and that is because the large steel companies which have substantial employment in Alabama and whose employees are organized in other parts of the country have not relentlessly fought unionization as have most employers in the southeast.

In opposing unions employers in the southeast receive in most instances the full and enthusiastic cooperation of the local authorities, including the city councils, the courts, and the police, local or state. Industrial plants are often enticed to locate in particular communities by being given free plants or plant sites which are financed by tax exempt local bond issues, and the local officials and community leaders undertake, as part of the enticement and to protect their investment, to bar unions.

As part of this pattern two devices, among others, are extensively used to deny the right to form unions purportedly conferred by the National Labor Relations Act and, for that matter, the rights of free speech and assembly guaranteed by the Fourteenth and First Amendments.

One device is the issuance of a temporary restraining order or preliminary injunction in virtually every labor dispute, often in complete disregard both of substantive rights under the Fourteenth Amendment and the National Labor Relations Act and of the exclusive primary jurisdiction of the National Labor Relations Board. The other device is the enactment of blatantly unconstitutional local licensing ordinances.

We believe, and we seek to show, that the decision of this Court in this case may invite the continued use of these illegal injunctions and ordinances by further weakening the already inadequate remedies against them. We further submit, with all deference, that the decision of the Court will not promote "respect for judicial process" or "the civilizing hand of law" but will, rather, promote disrespect for the courts and the law by encouraging the continued abuse of judicial process to deny basic rights.

REASONS FOR GRANTING THE PETITION

1. *The decision may encourage abuse of the labor injunction by state courts.* While the opinion of the Court in the present case is not entirely clear, it may be read as requiring compliance with an injunction, even if the issuing court had no jurisdiction because of federal preemption. See especially the discussion in footnote 6 of *In re Green*, 369 U.S. 689. The decision clearly requires compliance with an injunction even though it is invalid under the Fourteenth Amendment as impermissibly restraining free speech and assembly; and as the dissenting justices point out it is difficult to believe that the Court meant to accord greater sanctity to the exclusive primary jurisdiction of the National Labor Relations Board than to the substantive rights protected by the Fourteenth Amendment. Hence we are concerned that the decision may require unconditional obedience to any and every state court injunction. Any such doctrines would be utterly destructive of any right to form unions in the southeastern part of the United States.

The experience of the AFL-CIO and its affiliated unions and available published materials show that the use of labor injunctions has steadily increased in the state courts in the southeastern States, even before the present decision.

Indeed the use of injunctions in labor disputes seems to have spread as industrialization has spread.

A monumental study, "THE USE OF STATE COURT INJUNCTIONS IN LABOR-MANAGEMENT DISPUTES" (Senate Document No. 7, 81st Cong., 2d Sess.), was published by the Senate Committee on Labor and Public Welfare in 1951.[1] This study found that the use of injunctions had approximately doubled in the southeastern States[2] during the post-World War II period, as compared with 1932-45. (Report, p. 96.) Yet at that time injunctions were still rare in the Carolinas (Report, p. 96), whereas they are, according to the advices received by the AFL-CIO, now standard operating procedure there. And the picture does not seem to be appreciably different in other States in the area: the petition for certiorari in *Construction & General Laborers' Union, Local 438* v. *Curry*, 371 U.S. 542, filed in 1962, listed (pp. 14-20) 46 cases in which preliminary injunctions had issued since 1952 in Fulton County (i.e., Atlanta), Georgia, alone.

In some areas, including, as we are advised, North and South Carolina, it is the usual practice for the judges to issue ex parte temporary restraining orders,[3] while in

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[1] The Committee commissioned four universities to study the use of state court injunctions in labor disputes in four areas of the country. One of these areas was the southeastern States, the study there being made by Duke University. In all four areas the surveys were conducted under the supervision of distinguished scholars, viz., Edwin E. Witte, University of Wisconsin; Benjamin Aaron, U.C.L.A., Milton R. Konvitz, Cornell; and Charles H. Livengood, Jr., Duke. No comparable study has been made since.

[2] For purposes of the study the southeast was defined (p. 92) as including the 10 States of Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee and Virginia. We use the same definition.

[3] The 1951 Senate Committee study states (p. 6):

"'In the Southeastern States ex parte restraining orders were issued in 81 of the 96 cases * * * for which information on this point was obtainable.

others some notice is given, and in still others the usual practice is to issue a temporary injunction after a preliminary hearing. In any event, anything more than a preliminary hearing is extremely rare, because the dispute is usually settled long before any hearing on the merits can be obtained. Of the 46 injunction cases listed in the petition for certiorari in *Curry* not a single case ever went to hearing on the merits. As the petition explained, pp. 17-18, in Fulton County, Georgia, a case does not come up for trial on the merits in less than one year, and by that time the controversy is invariably entirely moot. The 1951 Senate Labor Committee study similarly found that few labor injunctions ever are carried beyond the temporary injunction stage.[4]

The restraining order or temporary injunction is often based on generalized allegations of violence or threats of violence, and that was the practice 25 years ago, too. (See Senate Report, p. 97.) The injunction is usually in broad terms, with no attention being paid to this Court's holding in *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131, that only violence, and not peaceful picketing, may constitutionally be enjoined. Thus in 41 of the 46 cases listed in the petition in

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[4] The study states (p. 7):

"The lack of full hearings in labor injunction cases, in which witnesses testify in open court and are subject to cross examination, is not due to any 'abuse' of the injunction procedure by the courts. It arises from the nature of labor-management disputes. These usually last but a short time and all pending legal proceedings are dismissed when a strike settlement is reached. • • • Injunctions in labor cases are almost always issued either ex parte or after only oral arguments in court, with the testimony confined to the complaint and answer and the supporting affidavits filed by the two sides. The pleadings and affidavits presented by the parties are often contradictory, yet the courts generally dispose of the litigation of this sort of evidence, without examination of the witnesses in person, unless the case reaches the permanent injunction stage (which, as noted, is rare)."

Curry, the temporary injunction restrained *all* picketing or striking. And the courts often pay little heed to any claim that the dispute is within the exclusive primary jurisdiction of the National Labor Relations Board. See, e.g., *Construction & General Laborers' Union, Local 438* v. *Curry*, 371 U.S. 542; *Hattiesburg Building & Trades Council* v. *Broom*, 377 U.S. 126 (per curiam); *Radio & Television Broadcast Technicians Local Union 1264* v. *Broadcast Service of Mobile* 380 U.S. 255 *(per curiam)*.

The injunction usually narrowly limits the number of pickets, and it customarily prohibits picketing on the employer's premises, such as the road into the plant, the parking lots, and so forth. Thus the pickets are moved out to the public highway, where the local police or sheriff's deputies harass them for blocking traffic.

Once the strike or organizing campaign is broken, or, much more rarely, the dispute is settled between the union and the employer, the legal proceedings languish.

That is the way the labor injunction works in the southeastern States at the present time.

The remedies now available against even flagrantly illegal state court labor injunctions are wholly inadequate.

Removal to federal court would be an adequate remedy but these cases do not fall within the general removal statute (28 U.S.C. §1441) or, under the decisions, of this Court, within the special removal statute applicable to civil rights cases, i.e., 28 U.S.C. §1443. See, e.g., *City of Greenwood, Mississippi*, 384 U.S. 808. While this Court has not ruled on whether state court suits for breach of contract under §301 of the Taft-Hartley Act are removable to federal court, a decision in favor of removal would not alleviate the situation with which we are here concerned; for state court injunctions are used in the southeast to bar unionization, not to enforce collective bargaining agreements.

A federal court injunction against state court proceedings where the matter is within exclusive primary NLRB jurisdiction would likewise be an adequate remedy, but is likewise unavailable under the Court's decision in *Amalgamated Clothing Workers* v. *Richman Bros.*, 348 U.S. 511.

The course seemingly required by the Court's decision in the present case, of complying with the temporary restraining order or preliminary injunction while appealing, is doubly inadequate.

In the first place, as already shown, the strike or organizing campaign will normally be defeated long before appellate review is obtained. This Court so recognized in *Construction & General Laborers' Union, Local 438* v. *Curry*, 371 U.S. 542, where it held that a preliminary injunction directed by the Georgia Supreme Court in a labor dispute properly within exclusive NLRB jurisdiction had sufficient finality to be reviewable by this Court. This Court declared (371 U.S. at 550):

> "The truth is that authorizing the issuance of a temporary injunction, as is frequently true of temporary injunctions in labor disputes, may effectively dispose of petitioner's rights and render entirely illusory his right to review here as well as his right to a hearing before the Labor Board."

In Tennessee, according to the 1951 Senate Committee study, p. 94:

> "An appeal cannot be made from a temporary restraining order and a defendant cannot move to dissolve except on hearing. Motions to dissolve are placed on the regular court docket and wait their turn to be heard."

The remedy of appeal through the state courts is thus even more clearly futile in Tennessee than elsewhere. In *Teamsters Union, Local No. 327* v. *Kerrigan Iron Works*,

353 U.S. 968, a temporary injunction against picketing was issued, and a motion to dismiss because of exclusive NLRB jurisdiction was denied, by the Chancellor, on January 12, 1953. The case was heard on the merits by the same Chancellor on June 28, 1955, and the injunction was made permanent on that date. The Tennessee Court of Appeals affirmed on June 29, 1956 (41 Tenn. 467, 296 S.W. 2d 379, 38 LRRM 2499), and this Court granted certiorari and reversed *per curiam* on May 27, 1957.

Plainly, in cases like these, appellate review, whether in the state courts or by this Court, is only of precedential value, and is meaningless as respects affecting the outcome of the particular controversy. Indeed in *Liner* v. *Jafco, Inc.*, 375 U.S. 301, the Tennessee Court of Appeals affirmed an injunction against peaceful picketing in part on the ground that the case was moot because the construction project had been completed. This Court reversed, holding that the dispute was within NLRB jurisdiction and that the Court was not bound by the state court's finding of mootness. The Court said (375 U.S. at 307):

> "It would encourage such interference with the federal agency's exclusive jurisdiction if a state court's holding of mootness based on the chance event of completion of construction barred this Court's review of the state court's adverse decision on the claim of federal preemption."

See also *IBEW Local Union 429* v. *Farnsworth & Chambers Co.*, 353 U.S. 969, reversing *per curiam* the Supreme Court of Tennessee.

In the second place, the appellate remedy is illusory because there is no ground for believing that state appellate courts in the southeast have any greater concern than do state trial courts for constitutional rights of free speech and assembly, or for the exclusive jurisdiction of the

NLRB. To be blunt, it is a case of out of the frying pan into the fire.

In *Curry* the Superior Court of Fulton County, Georgia, which, as the petition for certiorari recited, had issued preliminary injunctions totally prohibiting picketing or striking in 41 cases in the preceding 10 years, for once refused to issue an injunction in deference to NLRB jurisdiction; but the Georgia Supreme Court reversed and ordered an injunction. The Georgia appellate courts likewise flagrantly refused to protect the basic constitutional rights of workers and unions in *Staub* v. *City of Baxley*, 355 U.S. 313.

The situation is not different in other southeastern States. In Florida, the state trial courts repeatedly refused to enjoin peaceful organizational picketing of resort hotels, and the Florida Supreme Court repeatedly ordered that the injunctions issue. Finally this Court reversed *per curiam*, holding that the state courts were without jurisdiction. *Hotel Employees Union, Local No. 255* v. *Sax Enterprises, Inc.*, 358 U.S. 270. See also *Hattiesburg Building & Trades Council* v. *Broome*, 377 U.S. 126, reversing *per curiam* the Supreme Court of Mississippi.

In Alabama the remedy of appeal through the state courts seems to be worse than useless in labor injunction cases, at least from the union standpoint. The 1951 Senate Committee study contains the following passage (p. 93):

> "A complainant has the right in Alabama, however, to re-present its bill of complaint to a higher court if the lower court refuses to grant relief without a hearing. Several cases were found where the court of appeals or supreme court (Alabama has an intermediate and supreme court) granted ex parte orders, previously denied and set for hearing in the circuit court. The union attorneys claim the circuit is then reluctant to

dissolve the higher court's ex parte order when it comes to a hearing for a temporary injunction.[12]

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[12] The inference is that the circuit court judge may feel a modification or dissolution of the higher court's order will not stand if appealed. A reported case serves as an illustration.

The circuit court denied an ex parte request in which the employer sought to restrain a strike and all picketing on charges of a union breach of contract. Within a day the Alabama Court of Appeals granted the order ex parte. Upon hearing, the circuit court modified the order to allow truthful and peaceful picketing, although the strike was still enjoined. Upon appeal, the picketing was again enjoined (*Alabama Cartage Company, Inc.* v. *Teamsters*, 34 So.2d 576, 21 L.R.R.M. 2682; Jefferson County Circuit Court, June 20, 1947.)"

Here again, the situation does not seem to have changed since 1951. Consider, for example, *Radio & Television Broadcast Technicians Local Union 1264* v. *Broadcast Service of Mobile*, 380 U.S. 255. There the Circuit Court of Mobile County issued a temporary injunction against peaceful picketing on September 13, 1962; but on May 23, 1963, after hearing on the merits, it dissolved the injunction in deference to NLRB jurisdiction. But on December 12, 1963, the Alabama Supreme Court unanimously reversed, and directed that the temporary restraining order be reinstated. Its opinion declares (55 LRRM 2005): "It should be made clear that we have made no attempt to decide the merits of this case * * *." On March 15, 1965, this Court reversed *per curiam*.

When a union which is conducting an organizing campaign or strike is faced with an injunction against picketing or striking, and its counsel believes that the court had no jurisdiction to issue the injunction, or that the injunction violates the Fourteenth Amendment, what is the union to do? The opinion of the Court in this case seems to say that the union should obey the injunction, while seeking to have it modified or set aside by the state trial or appellate

courts. But all experience shows that this course is illusory. If an organizing campaign or strike is stopped, it cannot be turned on again like a water spigot. The organizing campaign will have lost its momentum and the strike have been broken. Months and years will pass while the illegal injunction continues in effect until the union disappears. To say in this context that a union must always obey an injunction is to permit state courts to stultify the National Labor Relations Act and even the Constitution of the United States, and the courts of several States have shown that that is just what they will do.

Unless the right to organize is to be completely destroyed over wide areas of the country, a union which is conducting an organizing campaign or strike must have the right to ignore, though at its peril, an injunction against picketing or striking which it believes to be illegal. If the injunction is ultimately adjudged to be lawful, the union can be punished for contempt, but if the injunction is ultimately adjudged to be unlawful there is no reason why the union should be subject to punishment for having refused to surrender the most basic rights of workers in deference to an illegal decree.

This doctrine which we urge has long prevailed in many States, and it has not produced any breakdown of law and order, for the evident reason that a union will not usually risk punishment for contempt by disobeying an injunction unless it is sure of its legal ground. According to the Court's opinion, the legality of an injunction may be challenged on contempt in Wisconsin but not in Alabama. Does the Court really think that these divergent rules insure "respect for judicial process" and "the civilizing hand of law" in Alabama, and not in Wisconsin?

Indeed the right to question the legality of an injunction in contempt proceedings is itself a feeble and inadequate

remedy. Unions or employees ignoring an injunction will do so at peril of fine and perhaps imprisonment if the injunction is ultimately held lawful. The job of the employees will also be at hazard. Moreover in the southeast, and particularly its rural areas, those ignoring an injunction, or striking or picketing at all for that matter, do so at peril of rough treatment from the police.

The reasons we want the right to ignore an illegal injunction—so perilous a proceeding can hardly be called a remedy—are that that is the only course which may keep a strike or organizing campaign alive, and that the contrary rule will encourage even more flagrant abuses of the labor injunction by state courts.

2. *The decision permits the use of unconstitutional licensing ordinances to bar unions.* A second legal, or rather illegal, device which is widely used in southeastern States to bar unions from particular localities is a municipal licensing ordinance. These ordinances make it a crime for a union or union organizer to solicit anyone to join a union without first securing a license. Usually an exorbitant license fee is fixed, and sometimes a daily fee or a fee for each person joining. It has long been settled, or as settled as the decisions of this Court can make it, that these ordinances are unconstitutional, yet they continue to be used to break up organizing campaigns; and we are fearful that the decision of the Court in the present case will encourage the use of these ordinances by compelling compliance with injunctions against organizing without a license, even though the licensing ordinance is unconstitutional on its face.

Normally no effort is made to give even a pretense of constitutionality to these ordinances. Thus the ordinance, adopted in 1954, which the Court held invalid in *Staub* v. *City of Baxley*, 355 U.S. 313, not only gave the mayor and city council complete discretion to grant or withhold a

license, but required payment of a license fee of $2,000 per year, plus $500 for each member obtained. No lawyer could have supposed, in view of such prior decisions as *Lovell* v. *City of Griffin*, 303 U.S. 444, that the Baxley ordinance would survive, but it served its purpose, which was to stop a particular union organizing drive.

Here, too, as in the use of labor injunctions, the AFL-CIO and its affiliates encounter a regular pattern. In many instances as soon as an organizing campaign gets under way an ordinance like the Baxley ordinance is passed,[5] and the union organizers are arrested, and the organizing campaign is effectively arrested too. The organizers are usually released on bond after a few days, but are afraid to resume organizing in view of the likelihood of recurrent arrests, and leave town. Prosecutions under these ordinances are usually dropped as soon as the organizing drive is abandoned, and few cases involving them find their way into the appellate courts.[6]

That being so, it is difficult to say how prevalent these ordinances are. For example, files of the AFL-CIO show that

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[5] Several years ago AFL-CIO organizers were arrested in Florence, South Carolina, purportedly under a local licensing ordinance. When the attorney retained by the AFL-CIO sought to obtain the text of the ordinance he met with evasion, but was eventually told that "the ordinance hasn't been passed yet."

[6] The L.R.R.M. digests (key no. 73-50) list about 15 appellate decisions from 1943 to date. All of the reported decisions are from the southeastern States or Kentucky, except for *In re Porterfield*, 28 Cal.2d 91, 168 P.2d 706 (Calif. Sup. Ct., 1946), holding a licensing ordinance invalid. Several anti-union municipalities in rural California, and more recently in rural Kentucky, adopted "right-to-work" ordinances, but these ordinances were held invalid. *Chavez* v. *Sargent*, 52 Cal.2d 162, 339 P.2d 801 (Calif. Sup. Ct., 1959); *Kentucky State AFL-CIO* v. *Puckett*, 391 S.W.2d 360, 59 L.R.R.M. 2337 (Ky. Ct. App., 1965). Presumably these ordinances were meant to lay a basis for enjoining strikes and picketing as seeking an illegal union shop, i.e., the technique disapproved by this Court in *Curry*.

five separate cities in Arkansas enacted licensing ordinances and that several convictions resulted, but in all instances the cases were dropped when the unions appealed, so that no reported decision resulted. City ordinances are not compiled anywhere, or even printed except in the case of the larger cities. Often the only record of municipal ordinances is a typed file kept at the city hall, and even the attorneys practicing in a State do not know which towns have union licensing ordinances, or whether a particular town considers that its ordinance is still in effect or not. Sometimes licensing ordinances are repealed when union organizing is no longer imminent, while at other times they languish in limbo.

However, it is the belief of the AFL-CIO that a substantial number of these ordinances are still in existence, principally in the southeastern States. The brief for the appellant in *Staub* v. *City of Baxley* listed, beginning on p. 31, 30 of these ordinances. Perhaps a half dozen ordinances a year come to the attention of the AFL-CIO legal staff in Washington, but, as stated, we have no way of knowing which ordinances are considered to be still in effect.

In any event, and no matter how flagrantly unconstitutional the ordinance, there is even now no clearly available adequate remedy. And, as stated, we are fearful that the decision of this Court in the present case will make these ordinances even more effective by encouraging the device of incorporating them in injunctions, just as the parade ordinance was transformed into an injunction in the present case.

If prosecutions for organizing without a license could be removed to federal court, that would be an effective remedy, but they cannot. See *City of Greenwood* v. *Peacock*, 384 U.S. 808.

A federal district court injunction against enforcement of a licensing ordinance would likewise be an effective remedy, and it may be that such a suit will lie under the recent decision of this Court in *Dombrowski* v. *Pfister*, 380 U.S. 479. However, such earlier decisions as *Douglas* v. *City of Jeanette*, 319 U.S. 157, seemed to preclude an injunction, and they have usually been denied in the lower federal courts. [7]

Hence the only remedy which has clearly been held available to contest the constitutionality of these licensing ordinances is an appeal from a criminal conviction, as in *Staub*. As stated, even this remedy is quite ineffective because in the meantime arrests will have broken up the organizing drive.

However, we are concerned that even this inadequate remedy will be undercut by the decision of this Court in this case. The opinion of the Court acknowledges that the Birmingham parade ordinance was of doubtful constitutionality, but nevertheless holds that the petitioners were bound to obey the injunction against parading without a license.

Any such doctrine will be utterly destructive in numerous towns and cities, of any right to organize, or, for that matter, to carry on any sort of agitation not acceptable to the municipal authorities.

3. *The decision exalts a state procedural rule over basic substantive federal rights.* We submit that in several respects the decision in the present case is wholly inconsistent with long established and sound Supreme Court doctrine.

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[7] Injunctions were denied in *Steelworkers* v. *Fuqua*, 253 F. 2d 594 (6th Cir., 1958); *Steelworkers* v. *Bagwell*, 239 F. Supp. 626, (W.D.N.C., 1965); and *Starnes* v. *City of Milledgeville*, 56 F. Supp. 956 (M.D. Ga., 1944). An injunction was granted in *Denton* v. *City of Carrollton*, 235 F. 2d 481 (5th Cir., 1956).

In the first place no state procedure can be regarded as valid, so that resort to it is required, if the procedure itself demands a substantial relinquishment of constitutional or other important federal rights.

The opinion of the Court holds that the defendants were required to comply with the parade ordinance by applying for a permit, notwithstanding the delay involved and even assuming that the ordinance was unconstitutional, and that they were even more compelled to comply with the temporary injunction, unless and until it was set aside on appeal, even if both injunction and underlying ordinance were unconstitutional. Yet resort to those procedures would have required that the defendants forego their constitutional rights of free speech and assembly, at the behest of an illegal ordinance and order, during the height of the controversy in which they were engaged. It would have required them to postpone exercising their vital constitutional rights in deference to unconstitutional demands during the very period when the vindication of those rights was most important to them.

In a labor relations context this doctrine means that unions and workers must forego their right to picket or strike, in deference to an unconstitutional ordinance or an illegal injunction, at the height of a strike or organizing campaign. It means that an unscrupulous city council or judge can break any strike or organizing campaign, even if the organizers or strikers are so sure that the ordinance or injunction is illegal that they are ready to risk jail if they are wrong. We submit that any state procedural rule which requires forfeiture of federal rights in deference to an illegal ordinance or court order is itself an invalid restraint. That is what this Court held in *Staub* v. *City of Baxley* and *In re Green*, 369 U.S. 689.

We respectfully urge that the Court adopt the following formulation of Mr. Justice Clark, dissenting in *Williams* v. *Georgia*, 349 U.S. 375, 399:

> "A purported state ground is not independent and adequate in two instances. *First*, where the circumstances give rise to an inference that the state court is guilty of an evasion—an interpretation of state law with the specific intent to deprive a litigant of a federal right. *Second*, where the state law, honestly applied though it may be, and even dictated by the precedents, throws such obstacles in the way of enforcement of federal rights that it must be struck down as unreasonably interfering with the vindication of such rights."

If, however, these state procedural rules are not themselves unconstitutional, surely then the issue becomes one of weighing the state interest against the federal right. As the court said in *Henry* v. *Mississippi*, 379 U.S. 443, 447-448:

> "[A] litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights."

Here the state interest is in compelling respect for even illegal court decrees or city ordinances until set aside, while the federal rights involved are basic constitutional rights of freedom of speech, assembly, etc. We submit that in any such weighing the federal rights should prevail. That is additionally so because the state interest is adequately insured by the fact that any person ignoring an injunction or an ordinance will do so on pain of criminal punishment if he is mistaken in his belief of invalidity.

Numerous state procedural rules, which may be valid in themselves, have been held to rest on a state interest too insubstantial to preclude vindication by this Court of constitutional or other federal rights. See, e.g., *Staub* v. *City of Baxley*, 355 U.S. 313; *Liner* v. *Jafco, Inc.*, 375 U.S. 301; *Construction & General Laborers Union, Local 438* v. *Curry*, 371 U.S. 542; *Shuttlesworth* v. *City of Birmingham*, 376 U.S. 339.

Finally, it should be noted that the result so far reached in this case is neither dictated nor even supported by *United States* v. *United Mine Workers*, 330 U.S. 258. No member of the Court in that case even suggested that its holding was meant to give trial courts an unreviewable power to punish for contempt of injunctions issued without jurisdiction or in violation of constitutional limitations. To the contrary Mr. Justice Frankfurter in his concurring opinion, joined by Justice Jackson, declared (330 U.S. at 310):

> "To be sure, an obvious limitation upon a court cancannot be circumvented by a frivolous inquiry into the existence of a power that has unquestionably been withheld. Thus, the explicit withdrawal from federal district courts of the power to issue injunctions in an ordinary labor dispute between a private employer and his employees cannot be defeated, and an existing right to strike thereby impaired, by pretending to entertain a suit for such an injunction in order to decide whether the court has jurisdiction. In such a case, a judge would not be acting as a court. He would be a pretender to, not a wielder of, judicial power."

The opinion of Mr. Chief Justice Vinson[8] likewise declared

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[8] This opinion is labeled "Opinion of the Court" but had the assent only of Justices Vinson, Burton and Reed.

that an injunction need not be respected (330 U.S. at 293) "were the question of the jurisdiction frivolous and not substantial," and that an order must be obeyed only if "issued by a court with jurisdiction over the subject matter and person."

Subsequent decisions of the Court have made it clear that the *Mine Workers* doctrine does not require obedience to any and every injunction. A majority in *In re Green*, 369 U.S. 689, clearly held that an injunction issued by a state court which lacked jurisdiction because of federal preemption could be challenged in contempt proceedings. Indeed Justices Harlan and Clark dissented on the ground that the Court's opinion gave (369 U.S. at 693) "only a passing glance at the *Mine Workers* decision."

In *Johnson* v. *Virginia*, 373 U.S. 61, this Court set aside *per curiam* a contempt conviction where the defendant had refused to obey an order of a state judge to observe segregated seating in the courtroom. The Court did not so much as advert to any such proposition as that the judge's order had to be obeyed until set aside; and of course the Court was correct, for not only was the order unconstitutional but even temporary compliance with it would have deprived the defendant of a basic constitutional right.

Similarly in *Hamilton* v. *Alabama*, 376 U.S. 650, the Court reversed *per curram* a contempt conviction of a witness who had refused to answer questions until the prosecuting attorney would address her as "Miss." Here again there is no suggestion in the Court's opinion that the witness was bound to comply with the Court's order until it was set aside. That case came from the same jurisdiction as the present, i.e., Alabama; and see also *Fields* v. *City of Fairfield*, 375 U.S. 248.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for rehearing should be granted.

Respectfully submitted,

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